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CASES NOTED

WILLS — REVOCABILITY OF MUTUAL WILLS — JURISDICTION
OF THE PROBATE COURT IN FLORIDA

A husband and wife executed a mutual will disposing of their property. They covenanted to waive all rights to alter, amend or revoke the instrument under any circumstances after the death of one of them. Subsequent to the husband's death, the wife executed an individual will revoking all prior instruments. The wife died. Appellant, the named executor in both wills, petitioned the county judge's court (probate court) to probate the individual will. The probate judge, in considering both instruments, refused to admit the individual will to probate. He held that the mutual will was irrevocable and entitled to probate upon proof of execution, as this was the intention of the parties. On appeal, held, reversed: a mutual will possesses the inherent quality of revocability, and may be voided, notwithstanding the existence of covenants to the contrary. The probate court has no jurisdiction to decide the validity of and to enforce these covenants. *In re Shepherd's Estate*, 130 So.2d 888 (Fla. App. 1961).

Revocability is an essential characteristic of a will.\(^1\) However, Anglo-American jurisdictions have reached conflicting results on the question of whether or not a joint and reciprocal will,\(^2\) executed pursuant to a contract or containing a covenant not to revoke, is nevertheless revocable.

\(^1\) Allen v. Bromberg, 147 Ala. 317, 41 So. 771 (1906); Notten v. Mensing, 3 Cal. 2d 469, 45 P.2d 198 (1935); Keith v. Culp, 111 So.2d 278 (Fla. App. 1959); Shawver v. Parks, 239 S.W.2d 188 (Tex. Civ. App. 1951); Williams v. Williams, 123 Va. 643, 96 S.E. 749 (1918); 4 PAGE, WILLS § 1709 (3d ed. 1941); 34 FLA. JUR. Wills § 106 (1961).

\(^2\) Since the courts use the terms "mutual will" and "joint and reciprocal will" interchangeably, the writer will conform to this practice throughout the article.

A "joint" will is a single testamentary instrument which contains the wills of two or more persons. It is executed jointly and disposes of property owned jointly, in common or in severalty by the testators. Daniels v. Bridges, 123 Cal. App. 2d 585, 588, 267 P.2d 343, 345 (1954); Curry v. Cotton, 356 Ill. 538, 543, 191 N.E. 307, 309 (1934); In re Johnson's Estate, 233 Iowa 782, 786, 10 N.W.2d 664, 667 (1943); In re Cole's Will, 171 N.C. 74, 75, 87 S.E. 962, 963 (1916). A "reciprocal" will is one in which the testators name each other as beneficiaries under similar testamentary plans. Neipp v. Toolen, 313 Ill. App. 28, 31, 38 N.E.2d 980, 981 (1942). A will executed pursuant to an agreement between two or more persons to dispose of their property in a particular manner, each in consideration of the other is called a "mutual" will. A mutual will, if it contains no provisions for third persons, constitutes a single will and is the will of the first to die and has no further existence as the will of the survivor. Maurer v. Johanson, 223 Iowa 1102, 1105, 274 N.W. 99, 101 (1937). The contractual element is the distinguishing feature of a "mutual" will. Culver v. Hess, 234 Iowa 877, 883, 14 N.W.2d 693, 695 (1944); In re Schroeder's Estate, 228 Iowa 1198, 1202, 293 N.W. 492, 494 (1940). For an extensive discussion of mutual, reciprocal and joint wills, see Annot., 169 A.L.R. 9 (1947).
Confusion was created at the very outset. In 1769, this issue was raised for the first time in *Dufour v. Pereira.* This case, as reported by Dickens, stated that a mutual will is irrevocable after the death of one of the testators. It has been contended that the opinion reported by Dickens was inadequate and that a better perspective of the case was reported by Hargrave, wherein he stated that “though a will is always revocable, and the last must always be the testator's will; yet a man may so bind his assets by agreement, that his will shall be a trustee for the performance of his agreement.” Whether the will remained irrevocable after death or whether the will was revocable but the contract irrevocable was still in doubt. Legal writers then began to distinguish clearly between contractual rights under a will and the properties of the will per se. However, even today many courts have continued to create confusion by the use of loose language when discussing the “right to revoke.” Although they apparently intend to say that the contract to make the will is irrevocable, they set forth the proposition that the will, which was made in compliance with the contract, is irrevocable. This authority can usually be dismissed as a judicial accident or mistake which is not adhered to even in the jurisdiction in which it was decided.

3. 1 Dick. 419, 21 Eng. Rep. 332 (Ch. 1769).
5. 2 Hargrave, *Jurisconsult Exercitations* 99 (1811).
6. Id. at 105.
7. *Atkinson, Wills* § 49 (2d ed. 1953); 4 Page, *Wills* § 1709 (3d ed. 1941). Some early courts could not distinguish a will from the contract upon which it was based. They held that if a will was based upon a contract, the will was irrevocable and, therefore, it was invalid because all wills are inherently revocable. Clayton v. Liverman, 19 N.C. 532 (1837); see Hershy v. Clark, 35 Ark. 17 (1879); Walker v. Walker, 140 Ohio St. 157 (1862).
8. Janes v. Rogers, 224 Ark. 116, 271 S.W.2d 930 (1954). The court states that all wills are revocable unless based upon a binding contract. The court then states that the proper remedy is in equity and not in attempting to probate the mutual will; Brown v. Johnson, 69 Colo. 400, 194 Pac. 943 (1921); Baker v. Syfritt, 147 Iowa 49, 125 N.W. 998 (1910) (confusing language); Brown v. Webster, 90 Neb. 591, 134 N.W. 185 (1912); Slaton, 254 Tex. 35, 43, 273 S.W.2d 588, 593 (1954). In the Murphy case the court stated that the survivor could not revoke the mutual will because it was based upon a contract. In the very next paragraph the court stated that “Annie E. Murphy technically could have revoked her will, but the beneficiaries under the joint will, as probated at the death of B. H. Murphy, would have had a cause of action to come into court with an equitable proceeding and receive their rights under such probated joint will.” *Sparks, Contracts to Make Wills,* 40, 131 (1956).
9. Walker v. Yarbrough, 200 Ala. 458, 76 So. 390 (1917) seems to be in conflict with Allen v. Bromberg, 147 Ala. 317, 41 So. 771 (1906). In *re Crawford's Estate,* 69 Cal. App. 2d 607, 160 P.2d 64 (1945) held that a will inconsistent with a prior contract could not be probated; however, other cases in California are contrary. *In re Roll's Estate,* 193 Cal. 594, 226 Pac. 608 (1924); *In re Carpenter's Estate,* 104 Cal. App. 33, 285 Pac. 348 (1930); see *In re Berry's Estate,* 195 Cal. 354, 233 Pac. 330 (1925). In *Note, Recent Development of the Iowa Law of Joint and Mutual Wills,* 44 Iowa L. Rev. 523, 536 (1959), the writer states that wills are revocable and contracts to make wills are irrevocable in Iowa. The writer acknowledges the confusion in the Iowa courts and sets forth the Iowa cases which favor and oppose revocation of wills based upon contracts. The following cases are in favor of revocation: *In re Farley's Estate,* 237 Iowa 1069, 24 N.W.2d 453 (1946); *In re Johnson's Estate,* 233 Iowa 782, 10 N.W.2d 664 (1943).
In the vast majority of states, a joint and reciprocal will may be revoked during the lives of the testators, or after death by the surviving parties, regardless of whether or not the will was drawn and executed in accordance with a contractual obligation or a covenant "not to revoke." This, however, does not mean that one may avoid his obligation under the contract by revoking the will. It is the contract and not the mutual will which is irrevocable.

A minority of courts have failed to recognize the distinction between the effect of an instrument as both a will and a contract. They hold this instrument, joint and reciprocal in its provisions and executed in fulfillment of a contractual devise or bequest, to be an irrevocable will if the contract is one which equity should enforce. (dictum); Stewart v. Todd, 190 Iowa 283, 173 N.W. 619 (1919) (dictum); Baker v. Syfritt, 147 Iowa 49, 125 N.W. 998 (1910). Other cases are against inherent revocability: In re Ramthun's Estate, 249 Iowa 790, 797, 89 N.W.2d 337, 341 (1958) (dictum); Child v. Smith, 225 Iowa 1205, 282 N.W. 313 (1938); Maurer v. Johansson, 223 Iowa 1102, 1109, 274 N.W. 99, 103 (1937) (dictum); Powell v. McBlain, 172 Iowa 385, 391, 153 N.W. 56, 58 (1915) (dictum). The courts of Kansas and Texas are in the same state as the Iowa courts—confused. See cases cited notes 10, 12 infra; Sparks, Contracts to Make Wills, 40, 131 (1956).


In the absence of statutory provisions, an action for damages or equitable relief, based upon a contractual breach under joint and reciprocal wills, does not lie within the jurisdiction of a probate court. Generally, the jurisdiction of probate is limited to determining whether or not the will is the last will of the decedent.

In the instant case, the probate judge determined that the mutual will was irrevocable, rationalizing that this was the intention of the parties, as evidenced by the covenant "not to revoke." Although contending that the contractual agreement to make the mutual will was evidenced by the instrument, the probate judge stated that he had no authority to exercise equitable jurisdiction to determine the validity of the contract. However, he concluded that for the parties to litigate the cause in the circuit court, in an action for specific performance of the contract or the imposition of a trust upon the estate, would subject the estate and beneficiaries to multiple litigation.
In reversing the decision, the district court of appeal held that revocability is an essential element of all wills; thus, notwithstanding the existence of a covenant to the contrary, a mutual will may be revoked. A probate court “cannot admit a mutual will to probate where it has been revoked by the testator; nor can he [sic] enforce an agreement to make a mutual will by ordering probate of that will where it has been revoked by the testator in violation of the agreement.” Although revocation will not circumvent or avoid a valid contractual obligation, “whether or not revocation constitutes a breach of contract . . . is a matter to be dealt with in the proper forum.”

The court further stated that there is no constitutional or legislative authority which will permit the probate court to apply equitable remedies to decide the validity of and to enforce an agreement made between husband and wife to dispose of their property through a mutual will or a covenant not to revoke the mutual will.

utes. Fla. Laws 1957, ch. 57-148, § 1, at 251. This section provides that all agreements to make a will must be in writing. The section also states that it applies to agreements made on, after, or prior to January 1, 1958.

This section has been held to be violative of § 17 of the Florida Constitution, when applied to agreements made prior to January 1, 1958. The violation relates to the passing of any law impairing the obligation of contracts. Keith v. Culp, 111 So.2d 278, 280-81 (Fla. App. 1959).

The contractual agreement in Shepherd was made prior to the enactment of § 731.051.

20. The court relied upon a Florida case, wherein it was stated that “mutual wills are ambulatory like other wills, i.e., revocability is an essential element of all wills. Thus, it is not the wills, which are made in pursuance of a contract, that are irrevocable, but the contract upon which they are made that stands and may be enforced . . . . And this is true even though there is a covenant not to revoke.” Keith v. Culp, 111 So.2d 278, 281 (Fla. App. 1959).

23. In re Shepherd’s Estate, 130 So.2d 888, 891 (Fla. App. 1961). The statements made by the district court of appeal which relate to agreements to make mutual wills are dicta. The court was faced only with the problem of the revocability of a mutual will containing a covenant against revocation. It is doubtful whether there are any cases in the United States “on all fours” with the instant case. The Keith and the Williams cases, cited by the district court of appeal on page 890 of the opinion, can be distinguished easily. Neither case states that there was a written covenant not to revoke contained in the respective wills in those cases. See Rheinstein, Contracts to Make a Will, 30 N.Y.U.L. Rev. 1224, 1226 (1955).
25. Ibid. The court stated that § 7(3) of article V, of the Florida Constitution is the pertinent section relating to the jurisdiction of the probate court. However, the court could not interpret the language of that section to mean that the probate court had equity jurisdiction.
26. In re Shepherd’s Estate, 130 So.2d 888, 891 (Fla. App. 1961). Sections 732.01 and 733.32 of the Florida Statutes (1961) were stated to be the pertinent legislation relating to the problems before the court. The court would not construe these legislative enactments as granting equity jurisdiction to the probate court.
27. In re Shepherd’s Estate, 130 So.2d 888, 891 (Fla. App. 1961).
28. Id. at 892. A will based upon a contract and containing a covenant against revocation that nevertheless be revoked by the testator. The remedy by the aggrieved party is an action at law or in equity to enforce the contract. However, under the Florida statutes, the county judge may have jurisdiction to enforce this contract also, as the
From a practical standpoint, when the testator's last will revokes a prior will which he was contractually obligated not to revoke, it makes little difference whether or not the last will is probated. In this situation, the property in the hands of the beneficiaries under the last will may be impressed with a trust by a court of equity.29 The final effect will be the same as though the first will which was based upon a contractual obligation, was held to be irrevocable and entitled to probate.30

This writer does not suggest that the law relating to the revocability of wills31 be changed. However, it is suggested that the Florida Legislature take cognizance of the procedure in New York, Ohio and Kansas, where, by statute,32 the probate court is conferred sufficient equity jurisdiction to determine the validity of and to enforce contracts relating to the disposition of a decedent's estate.33 This result is achieved through an accounting proceeding in which the court has the power to impose a trust on the property involved.34 The reduction of prolonged and multiple litigation, and the economic good to be accomplished would greatly outweigh any occasional abuse which could easily be corrected on appeal.

The rationale behind this procedure is set forth in Raymond v. Davis' Estate,35 wherein Judge Cardozo stated: "To remit the claimant to another county judge's court is a court of equity insofar as the constitution grants to it certain exclusive jurisdiction. If the county judge's court does have jurisdiction to enforce this contract in a proceeding filed for that purpose, or to probate the will, thus enforcing the contract, it derives the jurisdiction from the statute giving the county judge's court jurisdiction to enforce contracts of the decedent for the sale or transfer of real or personal property. Fla. Stat. § 733.32 (1961). 1 REDFERN, WILLS AND ADMINISTRATION OF ESTATES IN FLORIDA § 11 (3d ed. 1957). The court in the instant case states that the county judge has no power to interpret and enforce contracts under § 733.32. This section concerns "cases where written agreements have been made for the sale and conveyance or transfer of real property in this state or of personal property, and the vendor has died before making such conveyance or transfer." 30. Note, Recent Development of the Iowa Law of Joint and Mutual Wills, 44 IOWA L. REV. 523, 539 (1959) (The irrevocable instrument is really the "legal" will although it may not be the "last" will.); Goddard, Mutual Wills, 17 MICH. L. REV. 677, 686 (1919).

31. See note 1 supra and accompanying text.
CONSTITUTIONAL LAW — ESTABLISHMENT OF RELIGION — SUNDAY CLOSING LAWS

Four cases testing the constitutionality of Sunday closing laws\(^1\) of Maryland, Pennsylvania, and Massachusetts, as being violative of the establishment of religion clause of the first amendment,\(^2\) were decided as corollary cases by the United States Supreme Court. A divided Court\(^3\) held: it is not a violation of the establishment clause of the first amendment\(^5\) for a state to set aside Sunday as a uniform day of rest for all citizens, even though these Sunday laws were originally enacted to aid the predominant Christian sects. A state is not prevented from achieving its secular goals because a law coincides or harmonizes with the tenets of certain religions.\(^6\) McGowan \(v\). Maryland, 81 Sup. Ct. 1101, 1153, 1218 (1961);\(^7\) Gallagher \(v\).

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36. Id. at 72, 161 N.E. at 423.
1. Also known as “blue laws,” a name given to colonial statutes of New Haven, Connecticut regulating the religious and personal conduct of citizens. The laws were bound in blue books. It is used today to describe statutes applying strict Mosaic principles. Black, Law Dictionary 218 (4th ed. 1951); 1 Bouvier, Law Dictionary 373 (3d rev. 1914); Webster, New International Dictionary 296 (2d ed. unabridged 1951). This term was used in the opinions of the courts below. Two Guys From Harrison-Allentown, Inc. \(v\). McGinley, 179 F. Supp. 944 (E.D. Pa. 1959); Crown Kosher Super Market, Inc. \(v\). Gallagher, 176 F. Supp. 466 (D. Mass. 1959); McGowan \(v\). State, 220 Md. 117, 151 A.2d 136 (1959). For a view that “blue laws” never existed see Martin, The Day 28-30 (1935).
2. Other major issues discussed and found not to be violative of the Constitution were: the free exercise of religion clause of the first amendment as applied to members of the Orthodox Jewish faith who closed their stores on Saturday, their Sabbath; the equal protection clause of the fourteenth amendment as applied to the classifications of exemptions itemized in the statutes; and the due process clause of the fourteenth amendment as applied to the vagueness and restrictiveness of these statutes. For a discussion of these issues prior to the present decisions, see Comment, 59 Colum. L. Rev. 1192 (1959).
3. Chief Justice Warren wrote the four majority opinions. Justice Frankfurter joined by Justice Harlan wrote a single concurring opinion for all four cases. Justice Douglas wrote a single dissenting opinion covering all four cases. Justices Black, Brennan, Stewart, and Frankfurter concurred and dissented on some of the other issues.
4. Only Justice Douglas dissented to this holding.
5. “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble and to petition the Government for a redress of grievances.” (Italics indicate the “establishment clause.”)
6. [Since the remainder of the text will handle only the establishment of religion issue which is interwoven through all the opinions, subsequent citations to the instant cases will be by citing McGowan \(v\). Maryland, 81 Sup. Ct. and the applicable page.]
7. This case affirmed a Maryland Court of Appeals decision upholding the conviction of seven employees of a discount department store for selling on Sunday a three